**Case No. 1-CB-10822**

# UNITED STATES OF AMERICA
# NATIONAL LABOR RELATIONS BOARD

DENISE AVALLON.,

Charging Party,

v.

TEAMSTERS LOCAL UNION NO. 25, a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Respondent.

## RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO.25's OPPOSITION TO EXCEPTIONS OF THE GENERAL COUNSEL

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I. Introduction

Administrative Law Judge Michael A. Rosas ("ALJ") issued a Supplemental Decision on back pay in this matter on February 20, 2014. ("Dec.") The GC filed exceptions to the decision on April 17, 2014. Respondent Teamsters Local 25 ("Respondent") hereby objects and opposes the exceptions filed by the General Counsel ("GC") on April 17, 2014.

Denise Avallon ("Avallon") sought back pay from Respondent Teamsters Local 25 ("Respondent") for a three year period from March 8, 2008 to August 24, 2011.[1] Other than a position that she held prior to seeking placement on Respondent's referral list and then voluntarily quit, Ms. Avallon had no interim employment for the entire back pay period. Respondent asserted that Ms. Avallon failed to reasonably mitigate her damages under these circumstances.

II. Facts

Ms. Avallon testified for the GC and three additional witnesses testified for the Respondent during two days of hearing on December 5 and 6, 2013. At trial, the parties stipulated to the calculations contained in the GC's amended compliance specifications. (Transcript "Tr." 7-9). Respondent reserve the right to raise the affirmative defense that Avallon had unreasonably failed to mitigate her damages. (Tr. 8-9).

A.) Ms. Avallon's Prior Work History

Ms. Avallon testified that she has two and a half years of college and a high school degree (Tr. 29). Ms. Avallon worked in the movie industry for Teamsters Local 25 contractors from September of 1997 to the summer of 2003. (Tr. 33). During that time, she drove 15

[1] The National Labor Relations Board ("NLRB"), on March 1, 2012, held that Respondent failed to refer Ms. Avallon for work as a driver in the motion picture industry in accordance with its referral rules and ordered her made whole.

passenger vans and transported crew members. (Tr. 32). Ms. Avallon testified that her work schedule in the movies varied from work assignments lasting approximately four months to a project lasting 10 days. (Tr. 32). Ms. Avallon agreed that she traveled long distances to work in the movies in the past, sometimes driving up to an hour and a half from her home. (Tr. 142). She testified that she knew the length of the movie assignments could be brief from 2 weeks to perhaps 4 weeks. *Id.* When she worked in the movies, Ms. Avallon would also seek unemployment and did some part time work as a receptionist at the YMCA and as a park ranger. (Tr. 33).

A summary of pension contributions made to the Teamsters Pension Fund shows that from 1998 until 2003, Ms. Avallon worked in the movie picture and television production industry for Teamsters Local 25 signed production companies. (Respondent's Exh. 1). The contribution history shows that Ms. Avallon has never worked in a capacity that could be considered full-time in the movie industry. In 2000, approximately 1000 hours were worked by Ms. Avallon in the movie-industry, which is about half a year. (Tr. 135). In 2001, the contribution history shows that Ms. Avallon worked about 484 hours, which is approximately 23% of a standard year. At this time, she acknowledged she was not getting health insurance because she hadn't worked enough hours to qualify under the Teamsters Plan for health insurance. (Tr. 139).

Ms. Avallon testified that when she was not getting sufficient work in the movies in 2003, she had to leave because: "I had a home. And my son was living with me. I had to do something." (Tr. 138). In 2003, Ms. Avallon ceased working in the movie industry and went to a temporary employment agency for approximately four months until she was able to get a job at Brown University as a mail driver. (Tr. 33-34).

Employment at Brown University began in March of 2004 and she was paid approximately $11 per hour. (Tr. 34). Ms. Avallon was married in 2005. (Tr. 149). Ms. Avallon testified that she ceased working at Brown University in August of 2006 because it was difficult for her to continually lift the bulk mail bins.[2] (Tr. 35). She left her position at Brown without another position to go to.

Following six to seven months of unemployment, Ms. Avallon began working at Tri Town Realty as a leasing agent. (Tr. 36, 159). At Tri Town Realty, she was also paid $11 an hour and did not have any benefits. Ms. Avallon worked with Tri Town Realty for about a year. (Tr. 162). She quit the job and left work in the "middle" of April of 2008, allegedly in anticipation of working in the movies. (Tr. 163)[3]. However, Ms. Avallon gave her notice to Tri Town prior to being called for any actual work in the movies. (Tr. 167). Ms. Avallon testified that she was not able to get unemployment benefits because she voluntarily left her part-time position at Tri Town Realty. (Tr. 58).

Regarding the anticipation of work in the movies, Ms. Avallon had filed a grievance on March 6, 2008 stating that Local 25 had refused her work by not putting her name on the regular employee list or the casual list. (Respondent's Exh. 12). Pursuant to GC's Exhibit 7, Ms. Avallon's grievance was denied and she was placed at number 145 on the casual list on March 11, 2008. Ms. Avallon appealed the denial of her grievance on March 19, 2008. (Respondent's Exh. 13). On April 24, 2008 Ms. Avallon's appeal of her grievance was denied. (Respondent's Exh. 14). Ms. Avallon signed the unfair labor practice charge in this case on April 25, 2008. (Respondent's Exh. 15).

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[2] The GC disputes the ALJ's finding on the reason that Avallon left the mail room at Brown University, even though it is a credibility determination and appears tangential to the issues in dispute in this matter.

[3] Records reflect that Ms. Avallon has not worked since 2008. See Exhibit #4 attached to GC Exh. 1(i) (showing only income is proposed back pay).

B.) Ms. Avallon's Efforts to Seek Employment

In May of 2008, Ms. Avallon filed two applications with Brown University stating she was still at Tri Town Realty. (GC Exh. 10 and 11). During the summer of summer of 2008, Ms. Avallon made six online applications to Brown University and three online applications to Wheaton College. (See GC Exh. 8, 32). During this time, she focused almost exclusively on positions with Universities. (Tr. 57).

There was a hiring freeze at Brown University starting in November of 2008. (GC Exh. 33). Ms. Avallon was made aware of the hiring freeze when she applied for a position on November 5, 2009. (Tr. 187). From November of 2008 to June of 2009, there is no dispute that Ms. Avallon did not apply for *any* jobs at all. (Tr. 189). Ms. Avallon then again applied online to Brown University, on June 24, 2009, almost eight months later, in spite of the hiring freeze. From September 26, 2008 when Ms. Avallon applied to Brown University (GC Exh. 17a) until June of 2010 when Ms. Avallon applied to Boyden Library (GC Exh. 26), the sum of Ms. Avallon's job seeking efforts were three online applications to Brown University where she knew there was a hiring freeze.

Thereafter, in 2010, Ms. Avallon applied again online to Brown University twice and to one additional employer. (Dec. p.7). In 2011, Ms. Avallon applied for two positions. *Id.* In sum, the ALJ concluded that Ms. Avallon appears to have only made 17 job applications in over three years and most of the applications were to Brown University. (Dec. p. 6)[5].

C.) Pension Benefits

[5] The ALJ did not credit Avallon's testimony to find employment where it was undermined by her failure to comply with a subpoena. ALJ was well within his discretion to disregard uncorroborated testimony by a witness who failed to comply with the subpoena or provide documentation. (Dec. n.27, 38, 42); see *DeLorean Cadillac v. NLRB*, 614 F.2d 554 (6th Cir. 1980) (denying backpay to claimant who maintained that he applied to 30 jobs but "produced no corroborating witnesses or tangible evidence of his efforts").

Charles Langone, Fund Administrator of the New England Teamsters & Trucking Industry Pension Fund ("Fund"), testified that Ms. Avallon is a vested participant in the Fund. (Tr. 98). For the years of 2008 and 2009, Mr. Langone testified that based on the GC's calculations, Ms. Avallon would have received credits from the Fund based on the suggested pension contributions. However, for 2010, Mr. Langone stated that Ms. Avallon did not meet the threshold hours for the accrual of benefits, which is 375 hours per calendar year, so she would not get credit nor any benefit whatsoever from contributions made during the year 2010 or thereafter. (Tr. 100).

D.) Employment Opportunities During the Back Pay Period

Rhonda Jellenik ("Jellenik") testified for the Respondent as a vocational expert. Ms. Jellenik testified that she was familiar with Ms. Avallon, heard the testimony in the compliance case, and reviewed the transcript from the unfair labor practice proceeding regarding Ms. Avallon's qualifications. (Tr. 210) Drivers in the movie industry at the time that Ms. Avallon was working did not require a commercial driver's license ("CDL"). (Tr. 213-4). Basically, they drove cast and crew members to different locations in Massachusetts and throughout New England. *Id.* Ms. Avallon agreed that she traveled long distances to work in the movies in the past, sometimes driving up to an hour and a half from her home. (Tr. 142). The hours of a movie driving position were extremely intermittent, some assignments could be weeks including 65 or more hours per week and others were shorter in duration. *Id.* During the back pay period, the hourly rate for driving in the movies was $22.75 an hour which included health and pension benefits. (Tr. 215).

Ms. Jellenik prepared a report which examined substantially equivalent jobs in the labor market during the back pay period. (Respondent's Exh. 17). Ms. Jellenik first examined "light

truck and delivery drivers" that did not require a CDL license. (Tr. 217). Based on the state job vacancy reports, Ms. Jellenik showed there was a range of 50,000 to about 75,000 job openings in transportation and warehousing in the years of the back pay period. (Respondent's Exh. 17, p. 2 ).

The salaries for light truck drivers and delivery services for the back pay period are broken down in Ms. Jellenik's report. (Respondent's Exh. 17, pg. 4-10). At the top of the range, delivery drivers earned over $25 an hour. (Tr. 219). Ms. Jellenik found that a driving position in the movies was equivalent, as far as straight wages paid, to the top 20-25% range of the light truck and delivery drivers.

The ALJ found the Massachusetts Work Force Development surveys for transportation jobs issued in 2008, 2009 and once in 2010 illustrative of transportation employment opportunities in those years. The Massachusetts Work Force Development survey was not issued in 2011. (Dec. p. 8. n.49) On page 17 of her report, Ms. Jellenik listed numerous positions that were available in 2011.

However, Ms. Jellenik also stated that it may not be appropriate in this case to look at the position strictly from the hourly wage standard because, as undisputed in the record, the movie position was not regular or consistent employment. It was temporary and sporadic in nature with no guarantee of any work. (Tr. 220). For instance, in Exhibit 4 of the compliance specification in 2008, the GC is seeking $24,000 a year in back pay based upon the hours of non-CDL driving in the movies. If that annual wage is converted to a full time hourly wage, it is approximately $11 an hour. *Id.* In 2010 and 2011, if the annual salaries allegedly owed to Ms. Avallon were converted to an hourly wage, it would be so low it would not have been covered by any minimum wage job. (Tr. 221). Ms. Jellenik's report also stated that if a converted hourly wage

for comparison of substantial equivalent positions was used, 70-75% of the light truck driver, delivery driver, and bus driver jobs in the relevant area would have been substantially equivalent for the tax years of 2008 and 2009. (Respondent's Exh. 17, p. 11).

Ms. Jellenik also did a transferrable skills analysis for Ms. Avallon's job search. She looked at Ms. Avallon's work experience and educational background and attempted to determine what other industries outside of driving may be appropriate for Ms. Avallon. (Tr. 228, Respondent's Exh. 17 pp. 11-13). Ms. Jellenik examined positions available in food preparation, sales, and office and administrative support as alternative positions for Ms. Avallon. The job openings based upon the state job vacancy records for these categories are listed in Ms. Jellenik's report and were substantial. (Respondent's Exh. 17 p. 13-15).

In summary, Ms. Jellenik testified there were equivalent positions available to Ms. Avallon if the movie driving position was based only upon an hourly rate. In addition to that conclusion, she also established that if the annual salary of the movie position allegedly owed to Ms. Avallon were converted to an hourly rate, many additional positions and job openings would have been equivalent for Ms. Avallon.

III. Argument

In reviewing decisions, it is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). As stated more fully below, Respondent asserts that the GC has not shown that any of the ALJ's credibility findings were incorrect by a clear preponderance of the evidence. Respondent further asserts that the ALJ's decision was otherwise correct and in accord with current Board law.

The guiding legal principles in this case date back many decades. In 1941, the Supreme Court introduced into Board law the duty to litigate, stating that deductions from back pay should be made "not only for actual earning," but also for "willfully incurred" losses. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-200 (1941). The duty to make reasonable efforts to find employment remains a requirement under the Board doctrine today. Respondents may reduce their backpay obligation by showing that a discriminatee failed to make "a reasonably diligent effort to obtain substantially equivalent employment." *Lorge School*, 355 NLRB No. 94 (2010), slip op. at 3.

It is now well settled that back pay liability is reduced if the discriminatee failed to make reasonable efforts to find interim work. *St. George Warehouse and Merchandise Drivers, Local No. 641, International Brotherhood of Teamsters*, 351 NLRB 961 (2007). It has been accepted by the Board and reviewing Courts that a discriminatee is not entitled to back pay to the extent that he failed to remain in a labor market, refuses to accept substantially equivalent employment, fails to diligently search for alternative work, or voluntarily quits alternative employment without good reason. *NLRB v. Mastro Plastics Corp.*, 354 F. 2d 170, 174 n.3 (2nd Cir. 1965) *cert. denied* 384 US 972. When determining the amount of backpay due, the Board tolls the backpay period during any portion of the backpay period in which the discriminatee failed to mitigate his/her damages. See NLRB Casehandling Manual (Part Three), Compliance Section 10558.1 (2007).

A. ALJ Correctly Concluded that Respondent Established the Existence of Substantially Equivalent Employment

Following *St. George's Warehouse* case, respondents can satisfy the requirement to show substantially equivalent jobs in the relevant geographical area by calling a vocational expert as a witness to testify that there are a number of comparable jobs in the geographical area based upon

BLS statistics or classified ads. *California Gas Transport, Inc. and Teamsters Local 104*, 355 NLRB No. 73 at 5, (stating the ALJ was "constrained" to find that the Respondent had satisfied its burden of showing that there were significant jobs in the geographical area).

Through the testimony and exhibits introduced by the Respondent's vocational expert Ms. Jellenik, the Respondent met its burden to show that "substantially equivalent jobs existed in the relevant geographical area." *St. George Warehouse*, *supra*. Ms. Jellenik prepared a report which detailed the substantially equivalent jobs in the labor market during the back pay period. (Respondent's Exh. 17).

The record here establishes that Jellenik reviewed Avallon's qualifications, including prior transcripts from this case concerning her employment history and her resume. (Tr. 212-213) Moreover, Jellenik was well versed in the labor market in southeastern Massachusetts and had thoroughly researched the availability of suitable jobs in the area. Finally, she had also reviewed the qualifications and requirements for a driver in Local 25's moving industry. (Tr. 214-215). Consequently, her opinions were appropriately admissible in evidence.

The ALJ found that Local 25 met its burden of proving that vacancies existed for substantially equivalent employment in 2008, 2009 and 2010 in the greater Boston and southeastern Massachusetts areas. (Dec. p.10). He found that southern Massachusetts was in the proximate distance of Avallon's residence and the greater Boston area involved commuting a distance of approximately 40 miles. *Id.* Ms. Jellenik provided a detailed report, credible testimony, and supporting documentation for the conclusions contained in her report at the hearing. Except for 2011, the ALJ credited Ms. Jellenik's testimony. The ALJ found credible the Massachusetts Work Force Development survey showing that hundreds, if not thousands, of jobs in the transportation and warehousing existed in 2008 through 2010. In addition, pursuant

to Ms. Jellenik's transferable skills analysis, he found that substantially equivalent jobs also existed in food service sales and office administrative support during the period. (Dec. 8-9).

Despite the thoroughness of Ms. Jellenik's report, the GC has filed voluminous exceptions to many issues concerning Ms. Jellenik's report, most of which are of little consequence to the decision. Presumably due to the less than diligent job search undertaken by Avallon, the GC has chosen to focus its efforts upon alleging shortcomings with Local 25's vocational expert.[7]

First, the GC argues that although Ms. Jelleniks' report provided both job openings in Massachusetts and wage distributions among existing jobs in Massachusetts during the back pay period in Massachusetts, it "never coheres enough" to demonstrate substantially equivalent employment. (GC Brief 17). The GC's challenge to Ms. Avallon's report here does not appear to be on any one specific point, but more in the form of general discontent.[8]

In this case, Ms. Jellenik testified to the basis for her opinions and she was subject to cross examination on the issue. Ms. Jellenik testified that she was familiar with Ms. Avallon's case and heard the testimony in the compliance case. She had reviewed the previous transcripts from the unfair labor practice proceedings and had reviewed the qualifications and requirements for drivers in the movie industry for Local 25. (Tr. 213, 214).

The GC had access to Ms. Jellenik's report and supporting documents. More importantly, they had a chance to cross examine her regarding her testimony, opinions and

[7] It is of course difficult to imagine any job market condition which could justify not applying to any positions at all for such extended periods. If diligence is lacking, the circumstance of a "scarcity of work and a possibility that none would have been found even with the use of diligence is irrelevant." *American Bottling Co.*, 116 NLRB 1303, 1307 (1956).

[8] For instance, the GC finds significance that only the 90th percentile and above of light truck drivers in southeastern Massachusetts earned a wage comparable to the wages offered in the moving industry. (GC Brief p. 19). However, Local 25's expert witness established that even if intermittent, sporadic employment at $22.75 per hour could be compared to regular, full time employment at $22.75 per hour in this industry, at least 10 percent of the positions listed would include such wages and are substantially equivalent employment.

conclusions. It was the GC's burden to cross examine Ms. Avallon to resolve any "unanswered questions." Moreover, the GC certainly had the opportunity to call its own expert witness to further dispute her findings and chose not do so. The GC did not dispute the admissibility of Ms. Jellenik's report or most of her testimony.

On similar issues that an expert witness testimony was "uncorroborated" and "generic in nature" in *Acosta v. Acosta,* 725 F.3d 868, 874 (8th Cir. Minn. 2013), the Court stated:

> Generally, however, such a challenge goes to the credibility of the expert testimony, rather than its admissibility. *Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 544 (8th Cir. 2006). '[I]t is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded.' Id. (quoting *Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004)).

The weight that the ALJ thereafter gave to the testimony of the expert witness and her report was well within his discretion.

Second, the GC attempts to argue that Ms. Jellenik should have been required to interview Ms. Avallon in order to prove the availability of substantially equivalent employment. However, "there is no requirement that the vocational expert interview the discriminatees to determine if generic jobs are available for the discriminatee or they would have likely been hired for specific jobs." *California Gas Transport*, 355 NLRB No. 73, slip op at 5 (2010).[9] In finding that Local 25 carried its burden of proving substantially equivalent employment, the ALJ reasonably relied on well-established state job vacancy reports, an expert witness' testimony whose qualifications were not disputed and current Board law.

Third, the GC challenges the ALJ findings which were used to explain the salaries presented by Local 25's expert witness. It is not necessary to the ALJ's finding to conclude that part time work in the movie industry was equivalent to full time work paying less. However, it

[9] The cases relied upon here by the GC were all issued prior to *St. George Warehouse, supra,* are not controlling on this matter. (GC Brief 22-23).

was more thorough for Ms. Jellenik to explain that the positions in the top 90th percentile in transportation and warehousing were not sporadic or intermitent work. Consequently, when the salary is annualized these positions would be at a much higher yearly wage than Avallon had ever earned.

Local 25 asserts that Ms. Jellenik did establish that substantially equivalent employment existed as the $22.75 per hour within the geographic location during the back pay period, and that fact alone is sufficient to establish that Local 25 has carried its burden of showing substantially equivalent employment. A consideration of the annualized rate of Avallon's salary is not necessary to the ALJ's findings, but additional explanatory information. Ms. Jellenik clearly states in her report wages for a school bus driver, light truck driver, or delivery driver would have been substantially equivalent in the top 25th percentile range. For taxi drivers and chauffers the top 10th percentile would have been substantially equivalent at the $22.75 per hour rate. (Respondent's Exh. 17 p. 10). The majority of positions listed in the state job vacancy openings were regular full time and part time positions, not seasonal or temporary positions. As stated by the ALJ, the findings regarding jobs with transferable skills at a lower hourly rate were supplemental to the job openings he first found existed in transportation and warehousing.[10]

Finally, on this point the GC argues that including jobs in greater Boston geographical area was error. First of all, it should be noted that Ms. Avallon testified that she traveled long distances to work in the movies in the past, sometimes driving up to a one hour and a half from her home. (Tr. 142) Avallon stated she commuted 100 miles from her home and went to work on the north shore of Boston. *Id.* As previously stated, the ALJ found that there were positions paying the substantially equivalent of the movies in the greater Boston area during this time period.

[10] ALJ stating *"[i]n addition"* additional jobs existed in other fields. (Dec. 8, line 20).

On this point, the GC disingenuously tries to interchange roundtrip distances with one way distances in the record. (GC Brief p. 27) Avallon clearly testifies that she did not want to work more than 50 miles "*from her home*" (Tr. 57) and evidence in the record shows that Boston is not more than 50 miles from Ms. Avallon's home. (Joint Stip. on Driving Distances) The GC attempts a sleight of hand in restating the testimony that Ms. Avallon did not want to drive more than 50 miles from her home *roundtrip* to attend her job. Accordingly, given the distances that she traveled in the past and that the evidence showed numerous high wage positions in the Boston area, the ALJ was correct in including jobs in the greater Boston area within his analysis.

B. ALJ Correctly Determined that Ms. Avallon was Not Reasonably Diligent in her Job Search During Portions of the Back Pay Period.

The ALJ used the correct principals of law to determine whether Avallon's job search was reasonable. (Dec. 11-12) He found that Avallon submitted 17 job applications in the three and a half year period between March 2008 and August of 2011. (Dec. 12) Judge Rosas broke the back pay period of time down into three different sections. From April of 2008 to November of 2008, he found that Avallon conducted a reasonable search for employment by submitting 10 applications. *Id*

Second, from November of 2008 to June 2009 he concluded that Avallon failed to submit any job applications. The ALJ correctly compared the situation *to Glens Trucking Company Inc.*, 344 NLRB 377 (2005), where the Board found that discrimantee failed to exercise reasonable diligence in seeking interim employment.

Finally, from June 2009 to May 2011, Avallon submitted 7 job applications during the almost two year period. *Id*. The ALJ properly found this effort to be lacking in reasonable diligence. *Moran Printing Inc.*, 330 NLRB 376 (1999) Under the applicable Board case law and the evidence in the record, the ALJ did not find Avallon's work search efforts reasonably diligent

after 2008. (Dec. 12). These findings were well supported by evidence in the record as more fully stated below.

1. Evidence in the Record Supports ALJ's Finding of Failure to Mitigate.

Ms. Avallon is seeking back pay from the Respondent for more than a three year period during which time she had no interim employment whatsoever, except for the position she quit. It is quite revealing in this case to contrast Ms. Avallon's efforts to find work in 2008 with her effort in 2003 to find work before she was married. When she was only getting minimal work in the movies in 2003, she had to leave the movies because *"I had a home. And my son was living with me. I had to do something."* (Tr. 138). In 2003, she promptly went to a temporary employment agency and worked at various jobs until she found something more steady.

However, Ms. Avallon's efforts in 2008 to find work were vastly different. She went for over seven months at a time without sending out one application, applied for two jobs during an entire year and still has not worked at any job to this day.[11] When she had to support herself and her son in 2003, she went out and got a job because she "had" to work. In 2008, when Ms. Avallon was married and being supported by her husband, she was unable to find any employment whatsoever for over three years. It seems clear that Ms. Avallon's failure to find work after 2008 is occasioned not by the lack of substantially equivalent positions, but by the fact that she was being supported by her husband and did not need to work to support herself. There is no other way to explain such an extended period of a lack of a diligent effort or such a prolonged period of unemployment that still exists some six years after her "desire" to work as a driver in the movie industry.

[11] Although the General Counsel objected to this evidence, the fact that Ms. Avallon has not worked since 2008 until the present is relevant for evaluating her efforts and intention of actually finding work during the backpay period. At some point during this period, she clearly went from an alleged job seeker to a wife who "does not work."

However, the diligence of a discriminatee's job search should not be measured by a married woman who may or may not choose to work outside the home to support herself. A good faith effort is "conduct that is consistent with an inclination to work and be self-supporting." *Allegheny Graphics, Inc.*, 320 NLRB 1141, 1144 (1996), enf'd 113 F. 3d 845 (8th Cir. 1997) (citations omitted). Respondent should not be liable for losses which are occasioned by Ms. Avallon's choice to stay home and be supported by her husband. As the *Southern Silk Mills* Court stated:

> We are of the opinion, however, that the usual wage earner, reasonably conscious of the obligation to support himself and family by suitable employment, after an ability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay "desirable new employment." *The fact that a married woman employee is being supported by her husband during the discharge period should not relieve her of the obligation to accept suitable employment.* The failure of these two employees, under the conditions existing in the present case, to seek or take other suitable, available employment, although at a lower rate of pay, over a period of approximately *three years*, constitutes to some extent at least loss of earnings "willfully incurred."
> 242 F 2d. at 700. (emphasis added).

The case is on point for Ms. Avallon's claim today. Because she is able to be supported by her husband, Ms. Avallon should not be allowed to choose to stay home for over three years and be less than diligent in her employment search.

When evaluated from the standard of "conduct that is consistent with an inclination to work and be self-supporting," Ms. Avallon's efforts to find employment are severely lacking in diligence. In sum, Ms. Avallon appears to have made 17 job applications during the three year plus back pay period, and most of the applications were to Brown University. (Dec. 12). On average, Ms. Avallon was applying for jobs on a rate of *less than once every two months*.

Starting in November of 2008, it is undisputed that Ms. Avallon did not apply for any jobs *at all* for a period of almost eight months. (Tr. 189). There was a hiring freeze at Brown University starting in November of 2008. (GC Exh. 33). Ms. Avallon was made aware of the hiring freeze when she applied for a position on November 5, 2009. (Tr. 187). It is certainly questionable whether Ms. Avallon was making a good faith effort to obtain employment if she was applying to an employer that she knew had a hiring freeze. But the next effort Avallon makes to seek employment is almost eight months later, on June 24, 2009, when she again applies to Brown University.

From September 26, 2008 when Ms. Avallon applied to Brown University (GC- 17a) until June of 2010 when Ms. Avallon applied to Boyden Library (GC Exh. 26), the sum of Ms. Avallon's job seeking efforts was three online applications to Brown University where she knew there was a hiring freeze. Sending three online applications to an employer with a hiring freeze over a period of almost two years is not a reasonably diligent search for employment. *See Glenn's Trucking Co.*, 344 NLRB No. 41 (2005), (finding that the respondent satisfied its burden of establishing that the discriminatee failed to exercise reasonable diligence in searching for interim employment where the discriminatee went for nearly a year with no evidence of any job search efforts). This failure for almost two years to seek employment in good faith establishes a lack of diligence on Avallon's part, and it was certainly not for an isolated portion of the back pay period. See *Grosvenor Resort*, 350 NLRB 1197, 1198 (2007).

Rather, this effort clearly shows a lack of diligence and a lack of a good faith effort. Respondent asserts that Ms. Avallon in effect withdrew from the job market in November of 2008 as she was not actively looking for employment. *See Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992)(finding the respondent meets its burden on the mitigation issue by

showing that the employee has withdrawn from the employment market). Accordingly, the ALJ was correct to find that Avallon failed to reasonably mitigate her damages after 2008.

2. Registration With Hiring Hall Alone was Not Reasonable In This Case.

The ALJ determined that this situation was distinguishable from cases where discriminatees are found to be justified in relying upon job referrals from a union hiring hall. (Dec. 12-13). The ALJ correctly found that "Avallon recognized far back as March 2008 that she would not be able to rely on her referral work from Local 25 and would need to look for alternative work." (Dec p. 13). Avallon filed an unfair labor practice in this case in 2008 alleging that she not getting reffered for work by Local 25. Since that time, Local 25 consistently maintained in this case that Ms. Avallon's skills and qualifications were not sufficient for driving in the movie industry in New England. It is certainly reasonable to assume that the Board agent investigating the charge informed Avallon of Local 25's position. Ms. Avallon's alleged unsuitability for driving in the movies was also a major subject of hearing on the unfair labor practice before the ALJ in 2010 which Avallon attended. See GC Exh. 1(a). Given the parties positions in the case, it would not have been reasonable for Ms. Avallon to rely on Local 25's hiring hall to get work during the back pay period.

On this point, the GC argues that registration with Local 25's hiring hall and placement of the casual list was itself a reasonable search for work. (GC Brief, 30-33). Counsel for the GC here greatly overstates the significance of *Seafarers International Union,* 220 NLRB 698 (1975). That case involved the "peculiar work habits of seamen" and "the peculiarities of the seafaring world" in 1970. *Id.* at 699. Clearly, the work search habits of that particular individual in that particular industry at that time would have factored into the Board's findings. Local 25 asserts

that that case should be limited to its facts, as it is inconsistent with the broader principals of mitigation.

The duty of mitigate requires that a discriminatee use "use reasonable diligence" in finding *new* employment and is rooted in ancient principals of the law damages that the victim of a legal wrong use reasonable means to *minimize damages*. *See Ford Motor Company v. EEOC,* 458 US 219, 231 (1982) (emphasis added). Here, the GC turns the duty to mitigate on its head by suggesting that Avallon need take no efforts to minimize her damages. She alleged Local 25 unlawfully failed to refer her to positions driving in the movie industry in New England. Rather than seek alternative employment to reduce her damages, GC apparently is arguing that she need take no other efforts. She can sit idly by for over 3 years and seek back pay from Local 25 simply because she was placed on the casual list, which was the source of the back pay claim in the first place.

However, Avallon clearly has the duty to *mitigate* her damages, not a duty to *escalate* her damages. Suggesting that a discriminatee satisfies the duty of mitigation by simply reapplying to the same employer that allegedly discriminated against him or her in the first place is nonsensical and antithetical to the mitigation doctrine. In this realm, labor unions should not be disproportionately penalized just because they are operating a hiring hall.[13]

Moreover, the concerns of the *Seafarers* case do not appear here. Ms. Avallon has well established employment history in numerous different industries with numerous different employers. (Dec. 4-5) She certainly does not fit the mold of a union merchant seamen who has limited job search opportunities. In essence, she is not so specialized a discriminatee. Avallon

[13] Generally cases require a discriminatee to seek new employment. See *Southern Silk Mills*, 116 NLRB 769, 773 (1965). In the interest of promoting production and employment, the duty to minimize loss requiring discriminatees to make reasonable efforts to seek desirable *new* employment. Ohio Public Service Company, 52 NLRB 725 (1943)(emphasis added).

has used online job applications and temporary placement agencies in the past, and there is no justifiable reason to why she should have limited her job search to Local 25's hiring hall under these circumstances. See *Midwestern Personnel Services*, 346 NLRB 624, 626 (2006) (a discriminatee need only follow his regular method for obtaining work); *Tualatin Electric, Inc.*, 331 NLRB 36 (2000) (discriminatees satisfied their obligation to mitigate when they followed their normal pattern of seeking employment).

C. The ALJ Correctly Referred to Governing Documents to Determine Remedy.

The ALJ noted that "the pension fund would be harmed to the extent it is ordered to provide Avallon with additional pension credit without receiving the appropriate amount of contributions." (Dec. 3.) He found that the Respondent would be liable for contributions to the pension fund to the extent back pay was recoverable. (Dec. 13).

As to additional damages, the ALJ noted that pursuant to the Collective Bargaining Agreement ("CBA") running from October 2008 to September 2013 certain remedies were available to the pension fund against production companies who failed to make contributions, such as liquidated damages, attorneys' fees, interest and other penalties. (Dec. 3; GC Exh. 5, 6; CBA Article 9(d)). Accordingly, the CBA allows the trustees to take action against a production company for cost associated with collection. However, he did not find that the CBA provided for additional costs to be assessed against *the Union*, stating that the record was "devoid of evidence authorizing such payments." (Dec. 13, n.4) Here, it was not established that the pension fund accrued any cost associated with the collection of these pension contributions, nor that the pension fund was otherwise harmed. Furthermore, pursuant to the undisputed language of the CBA, such fees are collectable at the discretion of the trustees. CBA, Article 9(d). Here,

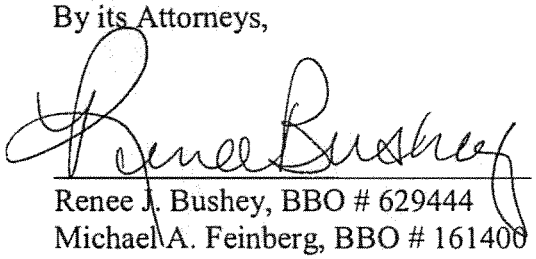
the Trustees of the pension fund have neither assessed nor established any cost, fees or other damages based upon Ms. Avallon's delinquent contributions.

It is well settled that the Board first looks to the funds' governing documents to determine any additional amounts necessary as a make-whole remedy for delinquent fund payments. *Triple A Fire Prot., Inc.*, 2011 NLRB LEXIS 476 (N.L.R.B. Aug. 26, 2011) (citing *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979)). Where the provisions in the funds' governing documents provide for interest and liquidated damages on delinquent payments, the contractual terms should be enforced. *Id.* (citation omitted). Accordingly, since any additional costs such as interest are not chargeable to Local 25 under the terms of the CBA, were not assessed by the Trustees of the plan, the ALJ was correct in determining such interest payments are not appropriately included in a back pay remedy.

## IV. Conclusion

Respondent Teamsters Local 25 established that substantially equivalent jobs existed in the relevant geographical area through established labor market job surveys, statistics and its expert witness. Evidence in the record also clearly established that Ms. Avallon's job search was neither reasonable nor diligent for the majority of the back pay period. Accordingly, the GC's Exceptions should be denied on all counts, and the findings and conclusions of the ALJ should be affirmed.

Respectfully submitted,
For Respondent,
International Brotherhood of Teamsters,
Local 25,
By its Attorneys,



Dated: May 15, 2014

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I hereby certify that on May 15, 2014, a true and correct copy of the foregoing document was served via electronic and/or regular mail copies to the parties listed below.

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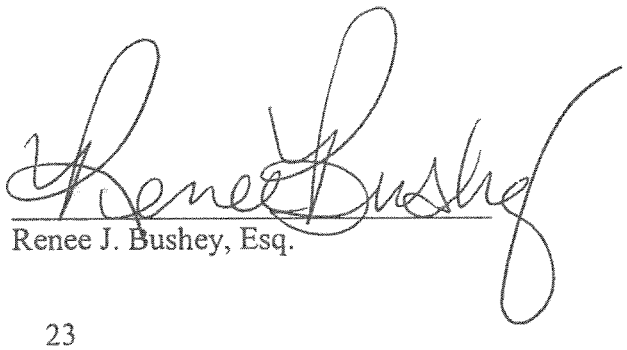

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